

The NLRB's New Standard: *Impact on Employer Workplace Rules*



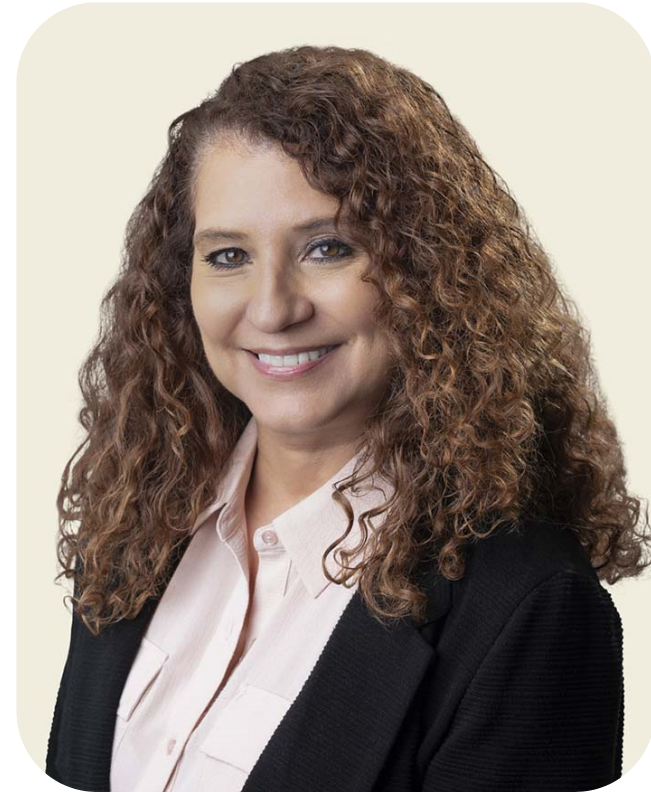
August 23, 2023

Presenters



Jack Merinar

Step toe & Johnson PLLC | Member
(304) 933-8135
jack.merinar@steptoe-johnson.com



Sandra Ramos White

Step toe & Johnson PLLC | Member
(210) 953-5045
sandra.white@steptoe-johnson.com

National Labor Relations Act – Overview

- Who is covered:
 - Most private sector employees
 - U.S. postal workers

(Includes non-union employees)

NLRA Exceptions

- Employees not covered by the NLRA
 - Supervisors (as defined by the NLRB)
 - Public sector employees (state, federal, local governments, and their sub-contractors)
 - Railroad and airline employees covered by the Railroad Labor Act
 - Agricultural employees
 - Domestic workers
 - Family members

NLRA – Section 7 Rights

- Self-organization
- Form, join, or assist labor organizations
- Bargain collectively through representatives of own choosing
- Engage in concerted activity
 - Collective bargaining
 - Mutual aid or protection
- Refrain from any or all such activities

Policies and Work Rules – Actual or Potential Interference with Section 7 Rights

- Expressly restricts activity
- Responsive to union activity
- “Reasonably tends to chill” exercise of rights

NLRB's Old Standard (Boeing Co.)

- Consideration
 - Nature and extent of the potential impact
 - Reasonable employee perspective
- Balances with employer's legitimate justifications for maintaining the rule

NLRB's Old Standard (Boeing Co.)

- Violation found if the rule
 - Prohibits or interferes with the exercise of Section 7 Rights; and
 - Adverse impact on Section 7 Rights that employer's interest does not outweigh
- Categories
 - Lawful
 - Individualized scrutiny
 - Unlawful

NLRB's New Standard (Stericycle, Inc.)

- Burden-shifting analysis
 - Presumptively unlawful if rule has a reasonable tendency to chill rights
 - Based on the perspective of an economically dependent employee
 - Regardless of the employer's intent
 - Regardless of the alternative, noncoercive interpretation is also reasonable
 - Rebuttable presumption
 - Rule advances a legitimate and substantial business interest
 - Interest cannot be achieved by a more narrowly tailored rule

NLRB's New Standard (Stericycle, Inc.)

- Board's decision did not apply its newly announced standard
- Remanded to ALJ to determine if the employer violated the NLRA by maintaining rules governing:
 - Personal conduct
 - Conflicts of interest
 - Confidentiality of harassment complaints
- New Standard applies retroactively
- Does not address savings clauses

Takeaways for Employers – What Stericycle Did Not Change

- An employer interferes with Section 7 rights by adopting a work rule that:
 - Expressly prohibits Section 7 activity
 - In response to union activity
 - Applying an employment rule to restrict the exercise of Section 7 rights
- An employer can violate the NLRA through rules that “reasonable tendency to chill” the exercise of rights even where:
 - No employees engage in concerted activity covered by the rule
 - The employer does not enforce the rule

Takeaways for Employers – What Stericycle Did Not Change

- Long-standing rules about when and where employees can engage in solicitation and distribution (non-work times and non-work locations).
- The need for employers to show why employees wearing pro-union clothing, buttons, stickers, or insignia harms the employers' interests (for ex: compromises safety).

Takeaways for Employers

- *Stericycle* is effective now
- Don't assume rules previously categorized as automatically lawful under *Boeing* are fine as written
- Review existing policies – can they reasonably be construed as restricting Section 7 activity?
 - Evaluate what legitimate and substantial business interest the rule promotes
 - Weigh value added against an increased risk of ULP litigation and liability
 - Revise to be more clear, precise, and narrow
 - Supplement with examples of conduct intended to address and to not address
 - Consider adding a disclaimer

Takeaways for Employers

- Be watchful for:
 - ALJ's holdings on remand
 - Post-*Stericycle* NLRB decisions concerning employer policies and work rules

More Takeaways

- Policies that impose limits on expression are going to be hard to uphold (civility and professionalism policies; social media policies)
- According to the NLRB, being rude, profane, and obnoxious is OK
- Policies that require confidentiality are going to be hard to uphold (no sharing of wage information; requirements to keep investigations confidential)
- According to the NLRB, asking employees to respect the confidential nature of an investigation is not OK

And Even More Takeaways

- Should the Board decide to investigate whether you have violated the NLRA, it will automatically review your policies and cite you for any that it considers unlawful, even if the offending policies have nothing to do with the allegations that the Board is investigating.
- The Board is following the lead of Jennifer Abruzzo, General Counsel to the Board. She has made it known that she thinks employers have too much power and balance must be restored by reigning them in.

Questions?



Disclaimer

These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the author and are not individualized legal advice. It is understood that each case and/or matter is fact-specific, and that the appropriate solution in any case and/or matter will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the presenter and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.

